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No. 89-1715

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

CATHY BURNS,
Petitioner,

vs.

RICK REED,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

LINLEY E. PEARSON
Attorney General of Indiana
DAVID A. NOWAK
Deputy Attorney General
Office of Attorney General
219 State House
Indianapolis, IN 46204-2794
Telephone: (317) 232-6318
Attorneys for Respondent

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Attorneys for Respondent

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The Respondent, Rick Reed (hereinafter Reed),
respectfully prays that the Court deny the Petition For
Writ Of Certiorari To The United States Court Of

Appeals For The Seventh Circuit filed by the Petitioner, Cathy Burns (hereinafter Burns), and affirm the decision of the United States Court of Appeals For The Seventh Circuit (hereinafter Seventh Circuit) and the United States District Court For The Southern District of Indiana (hereinafter District Court).

STATEMENT OF THE CASE

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that the only action taken by Reed was to provide legal advice to police officers and to present the State's case to a state court judge during a hearing on an application for a search warrant. The only issue raised is whether such conduct is protected by the doctrine of absolute immunity.

On September 2, 1982, an unknown person entered the home of Burns, shot her sons and attacked her with a blunt instrument (T. 157-8). Muncie police officers Cox and Scroggins conducted the investigation of this crime (T. 22).

On September 21, 1982, Burns was given a voice stress test, interrogated and threatened by police officers (T. 164-7). Cox and Scroggins then decided to place Burns under hypnosis. Up to this point in time, Reed had

no contact with or involvement in the police investigation (T. 65-6, 111).

Reed's first involvement in this case was on the afternoon of September 21, 1982 when Officer Scroggins made a telephone call to Reed (T. 66). Officer Cox explained the reason for the phone call as follows:

Q. And what was the conversation that you heard even though it was one-sided?

A. The extent of the conversation was that we were at the time contemplating a hypnosis session with Cathy and that we wanted him to give us his opinion on whether or not we should do that. At that particular time, I think Mr. Reed was a police liaison attorney as far as the police department was concerned. I can't say the exact words, but I indicated to Don to explain to him that we were aware of the fact that hypnosis of suspects may not be admissible as far as criminal proceedings were concerned; and we did advise him that she had indicated to us she wanted to do that and we wanted to know from him whether or not he felt we should proceed.

Q. What is your recollection about being told by Mr. Scroggins of Mr. Reed's response?

A. Mr. Scroggins indicated to me that Mr. Reed indicated to us if we had no other avenue to explore, we might as well do that.

(T. 101-2).

Officer Scroggins testified as to the reason for the phone call as follows:

A. I said that Cox and I had determined that we felt like she was the only one that could provide us additional information of the investigation and that we wanted to hypnotize her, but Cox had advised me that her being a possible suspect, that in his training, he was told that you do not hypnotize suspects.

Q. What did you tell Mr. Reed about Cathy Sells status as a suspect?

A. The conversation with Reed was brief. It was mostly just to advise him of the point we were at in the investigation and the request from him for permission to hypnotize her.

Q. What was Mr. Reed's response.

A. He said for us to go ahead.

(T. 37, 67).

Reed does not recall the telephone conversation in question nor does he dispute Officer Cox's and Scroggin's testimony concerning the telephone conversation (T. 125, 127). It must be noted that Reed was not advised that Burns was a suspect (T. 36) nor was he informed of any of the details of the case such as: that Burns had failed a PSE exam, how long Burns had been at the police station, that she had become ill while at the police station, that police officers had threatened Burns or that Burns had been deprived of lunch (T. 66-7).

Other than advising the police officers to proceed with the hypnotic session, there is no evidence to indicate that Reed was involved with the hypnotic session or the events leading up to the session. Reed

in no way instructed the officers on how to proceed with the hypnotic session (T. 113). Shortly after the hypnotic session, Officers Scroggins and Campbell arrested Burns (T. 67-9, 72, 114).

Either during the hypnotic session or shortly thereafter, Reed received a phone call requesting that he come to the police station to give some advice on the Burns case (T. 125-6). Reed recalls the reason for his attendance at the police station as follows:

Generally, I arrived at the detective headquarters. The only person I recall speaking to was Dr. Ken Joy. When I arrived, he was already there. But he began to tell me about what was going on. I didn't recall speaking to Officer Cox or Scroggins or any of the other officers.

I do recall seeing them there. I asked Dr. Joy what was going on. He proceeded to tell me about this hypnosis session that he had either witnessed or viewed a tape of. I asked him some questions about it; in response to which he told me that what he had seen gave him cold chills; that he thought it was quite possible we had a real case of split personality and this was a person who needed to be in the hospital and not in jail.

Somebody--I think it was Dr. Joy--asked me if that was possible if she could go to the hospital instead of jail. I gave my opinion that could be done.

(T. 130-1).

Officer Cox described the reason for Reed's presence at the police station and the advice given as follows:

Q. Did Mr. Reed participate in the decision to arrest Cathy at that time based upon the information you had supposedly obtained from her under hypnosis?

A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. It was decided during the discussion, of course, to—that she would not be kept in the Delaware County Jail; that she would be taken to Ball Memorial Hospital.

And, in fact, in order for us to take her to the hospital and have her committed to the psychiatric floor for examination we had to have an official police hold put on her which was the arrest.

Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?

A. Mr. Reed indicated that we probably had probable cause for the arrest.

(T. 107-8, see also, T. 115).

Officer Scroggins described Burns' arrest and Reed's involvement in the arrest as follows:

A. I told her we were going to arrest her at that point.

Q. Prior to that time though, excluding the telephone conversation with Mr. Reed, did you discuss with Mr. Reed the decision to arrest Cathy Sells?

A. No. That's not the policy. We arrest people. The police department arrests people. And

the prosecutor's office is the one that actually files the formal charge.

Q. Is it a practice—my next question is is it a practice for you to consult with the prosecutor's department or office before you arrest an individual?

A. No.

Q. And you did not do so in this case?

A. No.

* * * *

Q. Did you and Mr. Reed and anyone else you can think of engage in a discussion about whether or not to arrest Cathy?

A. I was in the room. And Marvin Campbell had come in the room. And they were the ones that actually arrested Cathy and advised her that she was being placed under arrest.

Q. So the decision to arrest, if it took place, you don't recall whether Mr. Reed was

part of that or you didn't hear him being part of that?

A. No, I didn't hear. The only involvement that I can recall Mr. Reed being involved in was after we had filled out the arrest sheet on Cathy. Then we went into the hallway. And Mr. Reed and Mr. Joy, Captain Cox, and Deputy Chief Bodkin was there. And the decision was made then whether to take her to the hospital rather than take her to jail . . .

(T. 69, 38-9).

The day following Burns' arrest, Reed and Officer Scroggins appeared before the trial court and obtained a search warrant for the search of Burns' residences. It is undisputed that the trial judge was not informed of the fact that Burns' only confession, which formed the probable cause for the warrant, was obtained through the use of a hypnotic session. Burns' made no other confession.

In explaining his failure to inform the trial court of this fact, Reed stated:

A. My testimony is that when I was questioning Lieutenant Scroggins in front of Judge Cole, I was under the assumption that he had

interviewed her and gotten a confession from her. We are not talking about the hypnosis session. I knew about that. I had been there the following evening.

(T. 136).

Reed's testimony is clear that he was under the impression that Burns had confessed in an interview other than the hypnotic session. He was provided this information from another individual thought to be Michael Alexander (T. 134-140, 147-8). It is undisputed that Reed's impression of the facts was erroneous. Other than Reed's in-court participation in obtaining the search warrant, Reed had no other involvement in the search (T. 121).

Burns has attempted to argue that Reed either participated in a decision or instructed the police officers in question to conceal the fact that the confession was obtained from a hypnotic session. Such a contention simply lacks any evidentiary support. Officer Scroggins, who testified at the search warrant hearing, testified that he had no prior discussion with Reed concerning his testimony and was never instructed by Reed not to talk about hypnosis (T. 50-1, 46, 48, 137). None of the witnesses indicated that there was an attempt to conceal the fact that the confession was obtained pursuant to a hypnotic session (T. 109, 133).

Eight days later, a prosecution against Burns was initiated and an arrest warrant was obtained (T. 11-2). It is undisputed that the affidavit of probable cause, which justified the issuance of the arrest warrant, failed to make any reference to the fact that Burns' confession was obtained pursuant to hypnosis.

There is absolutely no evidence in the record that Reed made any statements to the press. In fact, the contrary is true (T.130, 147, 110, 51).

After a week of trial and at the conclusion of Burns' case, the District Court granted Reed's motion for a directed verdict. The District Court found that the evidence established that Reed's only involvement in the case was to render legal advice to police officers, to represent the State in a state court proceeding concerning an application for a search warrant and to initiate a criminal prosecution. Pursuant to this evidence, the District Court held that Reed was entitled to absolute immunity for his activities. (See, Burn's Appendix, p. 15a). The Seventh Circuit affirmed the District Court's decision. (See, Burn's Appendix, p. 1a).

SUMMARY OF THE ARGUMENT

A prosecutor's act of rendering legal advice to police officers and appearing before a trial court to seek a

search warrant are quasi-judicial functions to which absolute immunity must attach.

ARGUMENT

In *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976), this Court issued an opinion which held "that in initiating a prosecution and in presenting a State's case, the prosecution is (absolutely) immune from a civil suit for damages under § 1983". This limited holding affords Reed absolute immunity for his conduct in initiating the Burns' prosecution by the filing of an information and seeking a warrant for the arrest of Burns.

Imbler recognized that not all activities of a prosecutor would be protected by the grant of absolute immunity. If a prosecutor engages in investigative activities, he is entitled to a qualified immunity or a "good faith defense comparable to the policeman's". *Id.*, at 430, 96 S.Ct. at 984. However, activities of a prosecutor which are an "integral part of the judicial process" were to be afforded the protection of absolute immunity. *Id.*, at 430, 96 S.Ct. at 984.

Reed maintains that his activities of appearing before a trial court, presenting evidence in support of an

application for a search warrant and obtaining such a warrant are in fact an "integral part of the judicial process". Only a prosecutor can appear before a trial court and request the issuance of a search warrant (T. 5). A prosecutor is clearly acting within the scope of his duties in engaging in such conduct. Such an appearance before a court must be considered an "integral part of the judicial process" since a search warrant cannot be issued without the prosecutor's involvement.

It is undisputed that the trial court herein was not informed that the confession from Burns, which was the sole basis for the search warrant, was obtained as a result of a hypnotic session. Reed explained that he was under the mistaken impression that there was a second confession which was obtained in the absence of a hypnotic session. Burns argues, without evidentiary support, that Reed intentionally lied to or mislead the Court so as to assure the granting of the application for a search warrant. Such a dispute in the evidence does not affect the applicability of absolute immunity.

Imbler recognized that absolute immunity must be afforded to prosecutors irrespective of their intent. This Court stated:

We conclude that the considerations outlined above dictate the same absolute immunity under

§ 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutors immunity would deserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Id., at 425-6, 96 S.Ct. at 993-4.

Furthermore, the majority in *Imbler* specifically held that absolute immunity would apply to, as in the instant case, allegations that a prosecutor willfully suppressed exculpatory information. *Id.*, at 411, N. 34, 96 S.Ct. at 995-6, N. 34. In sum, absolute immunity applies to a prosecutor's participation in court proceedings where the prosecutor requests the Court to issue a search warrant. Any dispute as to the motives of the prosecutor or the reason for the failure to provide the trial court with relevant information is simply irrelevant.

As previously noted, the *Imbler* holding was a limited one. While this Court recognized that a prosecutor's activities in initiating a prosecution were entitled to absolute immunity and actions of an investigative nature were afforded qualified immunity, this Court failed to further explain the type of activities which would fall into either category. Instead, this Court stated:

It remains to delineate the boundaries of our decision.

Id., at 430, 96 S.Ct. at 994.

In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), this Court listed three factors for determining whether an official's conduct enjoyed absolute immunity. The Seventh Circuit has applied the factors in *Butz* as follows:

First, we examine the historical or commonlaw basis for the immunity in question. Second, we examine whether the functions which the official performs subjects him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to retaliate the underlying

conflict and 'charge[e] the participants in the first with unconstitutional animus.' And third, we consider whether the official is subject to checks upon abuses of authority, such as the correction of error on appeal.

Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668, 671 (7th Cir. 1985), (citations to *Butz*, 438 U.S. at 512, omitted).

The Seventh Circuit carefully examined each of these factors and found that absolute immunity attached to the function of rendering legal advice. (See, Burn's Appendix, p. 1a).

In Indiana, the duties of a prosecutor are set out by statute. I.C. 33-14-1-1 *et seq.* An Indiana prosecutor is the state's attorney responsible for the prosecution of all crimes. It would be quite impossible for a prosecutor to effectively perform the function of his office without being able to contact and advise police officers on legal matters. The failure of police officers to follow the law can and will jeopardize any prosecution. A prosecutor must, therefore, render legal advice to assure effective prosecution of criminals and such conduct should be encouraged. To subject a prosecutor to § 1983 actions without the cloak of absolute immunity for the rendering of legal

advice would surely diminish the effectiveness of a prosecutor. The fear of vexatious litigation could, and in all probability would, cause prosecutors to refrain from rendering any legal advice to police officers and that in turn could seriously hamper the state's ability to effectively prosecute criminals. Reed concludes that such activities of a prosecutor are an "integral part of the judicial process" which this Court sought to protect when it issued its opinion in *Imbler* and the Seventh Circuit correctly decided all issues presented.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court deny the Petition for Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit and for any and all other relief just and proper in the premises.

Respectfully submitted,

Linley E. Pearson
Attorney General of Indiana

David A. Nowak
Deputy Attorney General

Attorneys for Respondent